Filed 3/13/19 Platinum Properties and Investments v. Hayden CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PLATINUM PROPERTIES AND INVESTMENTS et al.,	E069545
Plaintiffs and Respondents,	(Super.Ct.No. RIC1604632)
v.	OPINION
THOMAS HAYDEN,	
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes and Stephen D. Cunnison (Retired Judge of the Riverside Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges. Affirmed.

Thomas Hayden, in pro. per., for Defendant and Appellant.

Law Office of Susan D. Stein and Susan D. Stein; Law Office of Michael G. York and Michael G. York for Plaintiffs and Respondents.

In this action, after a full trial, the trial court set aside a default judgment, in favor of Thomas Hayden and against Platinum Properties and Investments et al. (Platinum),

that had been entered in a prior action. Hayden appeals. We will hold that he has not provided us with an adequate record. We will also hold that, on the record we have, his contentions lack merit.

I

FACTUAL BACKGROUND

As we will discuss further (see part III.A, *post*), Hayden has not supplied us with an adequate record of the trial proceedings. Perforce, then, the following statement of facts is based on documents attached to Platinum's complaint,[1] evidence submitted in connection with Hayden's motion for summary judgment, and documents of which Hayden requested judicial notice below. It does not appear to be disputed, aside from the disputes that we will specifically point out.

Hayden owned a piece of real property in Perris, California.

On March 6, 2012, Hayden filed an action for unspecified relief against parties not involved in this appeal (case No. RIC1203228). On June 20, 2012, he filed an action to quiet title to the property against more or less the same parties (case No. RIC1209448). The two actions were eventually consolidated (prior action).

[1] For example, the proof of service that is critical to Hayden's contentions is not in the record except as an attachment to Platinum's complaint.

On August 27, 2012, Platinum bought the property at a foreclosure sale. According to Ruben Birle, the principal of Platinum, immediately after the foreclosure sale, Hayden[2] came up to him and dropped some papers at his feet. Hayden disputes this.

On September 20, 2012, Hayden amended his complaints to name Platinum as a Doe defendant.

On October 17, 2012, Hayden filed a proof of service. It recited that an unnamed "agent for Platinum" had been served, at the same address as the foreclosure sale — but on September 20, 2012 (not August 27, 2012), and by one Micah Catlin (not by Hayden). In addition, it indicated that the summons had been served on the recipient as an individual, not on behalf of Platinum.

On June 3, 2013, the trial court dismissed the "entire action against [d]efendants" — seemingly including Platinum.

On March 19, 2014, Hayden filed a motion to set aside the dismissal, solely as to Platinum. It was served on Platinum by mail at an address on "Burington" Circle in Riverside. On May 2, 2014, the trial court granted the motion and vacated the dismissal.

On May 15, 2014, at Hayden's request, the trial court entered Platinum's default. The request for entry of default was served on Platinum by mail at an address on "Burlington" Circle in Riverside.

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[2] Birle had never met Hayden before. However, the man who threw the papers at his feet was missing one hand, as is Hayden. Moreover, as we will discuss shortly, in 2015, there was a confrontation between Birle and Hayden; at that time, Birle recognized Hayden as the man who had thrown the papers at his feet.

According to Birle, Platinum never had an address on either "Burington" or "Burlington" Circle. Thus, it never received either the motion to set aside the dismissal or the request for entry of default.

On June 16, 2014, Platinum deeded the property to Anebur Properties (Anebur).[3]

On October 24, 2014, the trial court (per Judge John W. Vineyard) entered a default judgment, quieting title to the property, in favor of Hayden and against Platinum.

Both sides agree that, sometime in 2015, Hayden showed Birle a copy of the default judgment. According to Hayden's witness, Angela Rocha, this occurred on January 2, 2015. According to Birle, it occurred sometime in March 2015. Birle was at the property; Hayden confronted him, showed him a copy of the default judgment, and ordered him to get off the property. Birle called law enforcement and a sheriff's deputy responded. Rocha testified that the deputy also showed Birle a copy of the default judgment. Birle denied this; moreover, he testified that no one else (including Rocha) was present when he was speaking to the deputy.

In September 2015, Hayden closed his business and moved to Idaho. He claims that, at that time, he also destroyed his files, including evidence supporting his position that Catlin served Platinum on September 20, 2012.[4]

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[3] Further references to Platinum will include Anebur, as its successor in interest, when the context so requires.

[4] Hayden claims that his testimony on this point was corroborated by witness Jessica Rocha, who supposedly testified that "she personally destroyed the files of [the prior action]." Actually, she merely testified that she "assist[ed] Mr. Hayden in removing files and disposing of them." She did not testify that she personally destroyed any files.

II

PROCEDURAL BACKGROUND

Platinum filed this action against Hayden in April 2016. In the operative complaint, Platinum sought to set aside the default and the default judgment in the prior action.

In 2017, Hayden filed a motion for summary judgment, which the trial court (per Judge Sunshine S. Sykes) denied.

After a three-day bench trial, the trial court (per Judge Stephen D. Cunnison) ruled that the default and the default judgment were void on at least four grounds:

1. Platinum "was not properly served . . . or not served at all" in the prior action.

2. The proof of service did not comply with Code of Civil Procedure section 474 (regarding proof of service on a "Doe" defendant).

3. Platinum did not have an opportunity to introduce evidence at the prove-up hearing.

4. The default judgment granted relief in excess of that sought in the operative complaint.

[footnote continued from previous page]
She also did not testify that any of the files that were destroyed had anything to do with Platinum or the prior action.

The trial court also found: "Mr. Hayden's testimony was willfully false with respect to the completion of the proof of service . . . ; and accordingly, I credit none of his testimony except that which is supported by documentary or other evidence."

It therefore entered judgment in favor of Platinum and against Hayden.

III

GENERAL LEGAL PRINCIPLES

A. *Lack of an Adequate Record*.

"'"It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant."' [Citation.]" (*Mack v. All Counties Trustee Services, Inc.* (2018) 26 Cal.App.5th 935, 940.)

Hayden is clearly challenging the trial court's denial of his motion for summary judgment. It is less clear whether he is also challenging its ruling against him after a full trial; however, he does cite to the reporter's transcript of the trial to support his arguments, so we conclude that he is.

With respect to the motion for summary judgment, Hayden has not supplied us with Platinum's separate statement or its request for judicial notice. Accordingly, we have no idea which facts Platinum disputed and we do not have all of the evidence on which it relied.

With respect to the trial, the record is even scantier. The trial lasted three days; the trial court admitted some 25 exhibits into evidence. Hayden, however, has given us only

a partial reporter's transcript of only one of these days. Thus, we do not have Hayden's own testimony (except on rebuttal) or Birle's testimony. We also do not have the opening or closing arguments, which could have contained admissions or concessions. Hayden has not had any of the exhibits included in the clerk's transcript (see Cal. Rules of Court, rules 8.122(a)(3), (b)(3)(B)) or transmitted to us (see Cal. Rules of Court, rule 8.224).

As we will discuss, we may reject most of Hayden's contentions for this reason alone.

B. *Review, After a Full Trial, of an Earlier Denial of Summary Judgment.*

To the extent that Hayden seeks review of the denial of his motion for summary judgment, he has a problem. "As a general rule, the denial of summary judgment is harmless error after a full trial covering the same issues. [Citation.]" (*Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1410-1411.)

"Although orders denying motions for summary judgment . . . may be reviewed on direct appeal from a judgment after trial, the appellant must nevertheless show the purported error constituted prejudicial, or reversible, error (i.e., caused a miscarriage of justice). [Citation.] In general, an order denying a motion for summary judgment . . . does not constitute prejudicial error if the same question was subsequently decided adversely to the moving party after a trial on the merits. [Citations.] However, if the same question is not decided after trial, an appellant potentially may successfully assert on appeal that the trial court prejudicially erred in denying his or her motion for summary

judgment . . . . [Citation.]" (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343, italics omitted.)

"The reason [for the rule] is usually explained this way: '"A decision based on less evidence (i.e., the evidence presented on the summary judgment motion) should not prevail over a decision based on more evidence (i.e., the evidence presented at trial)."' [Citation.]" (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1011.)

Hayden raised the following issues both in his motion for summary judgment and at trial:

1. Platinum was properly served.

2. Platinum delayed unreasonably in seeking relief.

3. A judge may not overrule another judge.

As we will discuss (see part VII, *post*), it is at least arguable that the third issue presents a pure question of law that does not depend on the evidence presented in connection with the motion for summary judgment or at trial. The first and second issues, however, *do* turn on the evidence. Accordingly, any error in ruling against Hayden on these two issues in the context of the motion for summary judgment must be deemed harmless. Moreover, while we can consider these issues in the context of the trial, Hayden's failure to provide us with an adequate record of the trial proceedings (see part III.A, *ante*) requires us to resolve them against him.

IV

WHETHER PLATINUM WAS EVER VALIDLY SERVED

Hayden contends that Platinum was properly served.

Preliminarily, as mentioned earlier (see part II, *ante*), the trial court granted relief on several alternative grounds. Its finding that Platinum was not properly served was just one of these. For example, it also found that the relief granted in the default judgment exceeded the relief sought in the complaint. Hayden has not argued that these alternative grounds were erroneous; thus, he has forfeited any challenge to them.

In any event, as already discussed, to the extent that this error assertedly occurred in connection with the motion for summary judgment, it must be deemed harmless because there has been a full trial. (See part III.B, *ante*.) And to the extent that it assertedly occurred at trial, Hayden has forfeited it by failing to provide an adequate record. (See part III.A, *ante*.)

Separately and alternatively, however, we also reject this contention on the merits.

Hayden argues that Platinum admitted it was served by affirmatively alleging in its complaint that, on August 27, 2012, Hayden approached Birle and threw some papers at his feet. This allegation did not establish valid service, for four reasons.

First, on August 27, 2012, Platinum was not yet a party to the action. Hayden did not amend the complaint to add Platinum as a Doe defendant until September 20, 2012. Moreover, the proof of service did not state that Platinum was served as a Doe defendant,

as would be required. (Code Civ. Proc., § 474; *Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 858-861.)

Second, Platinum never admitted that the unspecified "papers" were actually the summons and complaint in the prior action. Moreover, as far as the record shows, Hayden never introduced any evidence that they were; that would be inconsistent with his claim that the summons and complaint were actually served on September 20, 2012, by Catlin.

Third, service cannot be effected merely by dropping the papers near the person served. Rather, even if the person tries to evade service, the process server must tell the person that he or she is being served with process. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) § 4:187, p. 4-29.)

Fourth, and most important, a summons cannot be served by a party to the action. (Code Civ. Proc., § 414.10.)

Alternatively, Hayden also argues that the proof of service, showing service by Catlin on September 20, 2012, raised a presumption that Platinum was properly served, and that this presumption has not been rebutted.

"The filing of a proof of service declaration ordinarily creates a rebuttable presumption that the service was proper, but only if the service declaration 'complies with the statutory requirements regarding such proofs.' [Citation.]" (*Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1163.)

Here, the proof of service stated that "The 'Notice to the Person Served' (on the summons) was completed as follows: . . . as an individual defendant." The individual who was assertedly served — presumably Birle — was not a defendant. Rather, Hayden needed to serve that individual on behalf of Platinum. However, the boxes necessary to indicate that the individual was served on behalf of Platinum were not checked. By statute, this precluded the entry of Platinum's default. (Code Civ. Proc., § 412.30; see also *id*., § 417.10, subd. (a).)

Finally, even assuming the proof of service did comply with statutory requirements, Birle rebutted the presumption by testifying that it was Hayden, not Catlin, who attempted to serve him, and that this occurred on August 27, 2012, not September 20, 2012. While Birle gave this testimony in connection with the motion for summary judgment, presumably he gave the same testimony at trial; without an adequate record, Hayden cannot show that he did not.

V

UNREASONABLE DELAY IN SEEKING RELIEF

Hayden contends that Platinum could not obtain relief from the default judgment due to its unreasonable and prejudicial delay — i.e., laches.

A. *Evidence of Delay*.

"In order to impute laches to one who seeks relief in equity, it should clearly appear that he either had actual knowledge of the facts or failed to acquire such knowledge after having notice thereof. [Citation.]" (*McNulty v. Lloyd* (1957) 149

Cal.App.2d 7, 10-11.) Hayden is all over the place with regard to exactly *when* Platinum supposedly had the necessary notice or actual knowledge.

He refers repeatedly to a delay of three years eight months. Counting back from April 20, 2016, when this action was filed, this would seem to mean that Platinum had notice on August 27, 2012, the date of the attempted service at the foreclosure sale.[5] Indeed, elsewhere in his brief, Hayden explicitly measures Platinum's delay from August 27, 2012.

According to Birle, however, on August 27, 2012, a man threw some papers on the ground in front of him. He did not testify that he ever read them. Thus, the trial court could reasonably find that, at that point, he was not aware of the prior action. Moreover, even assuming he was aware of the prior action, he was not aware of the *default judgment* in the prior action. Platinum could hardly move to set aside a judgment that had not even been entered yet.

At some points, Hayden suggests that Platinum had notice on September 20, 2012, when — at least according to his proof of service — the prior action was served on it. The trial court essentially found, however, that this never happened; in part IV, *ante*, we agreed. And, once again, it could not make Platinum aware of the *default judgment*, which still had not been entered yet.

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[5] We cannot be certain, however, that this is what Hayden means. At one point, he calculates the delay as ending on June 24, 2016. This is a mistake, because Platinum filed its complaint on April 20, 2016; all it did on June 24, 2016 was file an amended complaint.

Hayden also suggests that Platinum had notice by January 15, 2013. On that date, in a related unlawful detainer against Hayden, Platinum filed an opposition to Hayden's demurrer. It stated, "The pending quiet title action RIC1209448 has no effect on this action which is an unlawful detainer action." Thus, by then, Platinum's counsel, at least, was aware of the prior action. We repeat, however, that Platinum was not aware of the *default judgment*, which still had not been entered.

In any event, on June 3, 2013, the trial court dismissed the prior action. No matter what Platinum knew before that date, if it also knew of the dismissal, it would have concluded that there was no need for it to do anything. On this record, Hayden cannot show that this did *not* happen.

Finally, Hayden suggests that Platinum had sufficient awareness on January 2, 2015, when a sheriff's deputy supposedly showed Birle a copy of the default judgment. Birle denied that this occurred, although he did admit that Hayden showed him a copy in March 2015.

In sum, then, the trial court could reasonably find that Platinum's only delay was between March 2015 and April 2016.

B. *The Effect of Delay*.

Once again, to the extent that the error assertedly occurred in connection with the motion for summary judgment, it must be deemed harmless because there has been a full trial. (See part III.B, *ante*.) And to the extent that it assertedly occurred at trial, Hayden has forfeited it by failing to provide an adequate record. (See part III.A, *ante*.)

However, we also reject this contention on the merits.

"A judgment that is void on the face of the record is subject to either direct or collateral attack *at any time*. [Citations.]" (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1327, italics added.) "At any time" means just what it says. Hence, "[a] motion to vacate a judgment void on its face is not subject to a claim of laches." (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 831, fn. omitted.)

"[W]here it is shown that there has been a complete failure of service of process upon a defendant, he generally has no duty to take affirmative action to preserve his right to challenge the judgment or order even if he later obtains actual knowledge of it because '[w]hat is initially void is ever void and life may not be breathed into it by lapse of time.' [Citation.] Consequently under such circumstances, 'neither laches nor the ordinary statutes of limitation may be invoked as a defense' against an action or proceeding to vacate such a judgment or order. [Citation.]" (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1229.)

In *Gorham*, the defendant moved in 2008 to vacate a default judgment against him that had been entered in 1998. He introduced documentary evidence proving that he was incarcerated on the date when, according to the proof of service, he was personally served at his home address. (*County of San Diego v. Gorham*, *supra*, 186 Cal.App.4th at pp. 1221-1222.) The trial court found that the proof of service was fraudulent; however, it denied the motion because the defendant had learned of the judgment in 2002 but had not moved to set it aside until 2008. (*Id*. at pp. 1223-1224.)

The appellate court reversed; it held that the trial court abused its discretion by denying the motion to vacate. (*County of San Diego v. Gorham*, *supra*, 186 Cal.App.4th at p. 1225.) "[W]here it is shown that there has been a complete failure of service of process upon a defendant, he generally has no duty to take affirmative action to preserve his right to challenge the judgment or order even if he later obtains actual knowledge of it . . . ." (*Id*. at p. 1229.) "Unfortunately, . . . the [trial] court proceeded down an analytical path requiring Gorham to show due diligence within . . . a reasonable time to respond to a default judgment he never received and in a case never served on him. . . . [S]uch analysis was unwarranted in this case where fundamental jurisdiction was obtained through an intentional fraud on the court." (*Id*. at p. 1233.)

Hayden tries to recast his laches argument as an estoppel argument. In other words, he argues that Platinum's failure to seek to set aside the default judgment earlier constituted an implied representation that it was willing to be bound by the judgment, and that he relied on that representation by destroying his files on the case. Just as with laches, however, "a void judgment may be attacked at any time, without regard to principles of waiver or estoppel." (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 164.)

VI

THE CONCLUSIVE EFFECT OF THE DEFAULT JUDGMENT

Hayden contends that the default judgment could not be vacated in this proceeding, because (1) it was "stare decisis" (capitalization altered), (2) it was "res

judicata," and (3) "'one trial judge cannot reconsider and overrule an order of another trial judge.'"

We assume, for the sake of argument, that this is a pure question of law that does not depend on the evidence presented. If so, then we have an adequate record on which to decide it. And also if so, then it does not matter whether we decide it in the context of the motion for summary judgment or the trial.

The default judgment was not stare decisis, however, because it was rendered by a trial court, not an appellate court. """The doctrine of stare decisis expresses a fundamental policy . . . that a rule once declared in an *appellate* decision constitutes a precedent which should normally be followed . . . ."""" (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1180, fn. 9, italics added.) "Trial court decisions are not precedents binding on other courts under the principle of stare decisis. [Citations.]" (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1148.)

The default judgment also did not operate as res judicata.

A judgment cannot bar equitable relief from itself. "The judgment, order or decree from the effect of which relief is sought cannot constitute a bar to equitable relief. A proceeding for equitable relief is not a collateral attack, and since its sole aim and purpose is to avoid the effect of said judgment, the doctrine of res judicata can have no application to such judgment. [Citations.]" (*Caldwell v. Taylor* (1933) 218 Cal. 471, 475.)

Moreover, the trial court found that the default judgment was void. "[I]t is hornbook law that a void judgment has no effect as either res judicata or collateral estoppel. [Citations.]" (*People v. Amaya* (2015) 239 Cal.App.4th 379, 387.)

Last, Hayden "asserts that a superior court judge may not review the judgment of another superior court judge . . . . [Citations.]" "Where, however, the judgment is final, it may be set aside as a void judgment by a judge other than the one who granted the default judgment. [Citations.]" (*Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1134-1135.)

VII

THE TRIAL COURT'S CONSIDERATION OF BIRLE'S DECLARATION IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

Hayden contends that Platinum could not rely on a declaration by Birle in its opposition to his motion for summary judgment.

A. *Additional Factual and Procedural Background.*

In opposition to the motion for summary judgment, Platinum submitted a declaration of its principal, Birle.

In his reply, Hayden argued that the trial court could not consider the declaration, because "'a party may not rely on his own pleadings — even if verified — to oppose a motion for [s]ummary [j]udgment.'"[6] (Italics omitted.)

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[6] Not only in his reply papers, but also in this appeal, Hayden indicates that this is a quotation from *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040. It

At the hearing on the motion, the trial court gave a tentative ruling that "the declaration provided by [Platinum] created a triable issue of fact." Hayden responded:

"MR. HAYDEN: . . . The problem is that a party may not rely on its own pleadings even if verified to oppose a motion for summary judgment. That's the law.

"THE COURT: That's not a pleading. It's a declaration.

"MR. HAYDEN: A pleading and a declaration are the same thing, Your Honor. In all due respect to you, you, in fact, struck down in your findings after another summary judgment motion that I was a party to, you quoted — that's your quote. That's a quote from this Court, from you, that you struck down a declaration of a party, of a party who [was] opposing summary judgment, and you used that as your basis. So basically what you are saying to me is well, I accept[ed] it then, but I don't accept it now. That doesn't make any sense, your Honor. You've shown, if nothing else, the appearance of bias."

[footnote continued from previous page]
is not. Neither this wording nor any paraphrase thereof can be found anywhere in *Roman*.

Roman does say, however, "Citation to [the plaintiffs'] own pleading is meaningless: It is fundamental that to defeat summary judgment a plaintiff must show 'specific facts' and cannot rely on allegations of the complaint. [Citations.]" (*Roman v. BRE Properties, Inc., supra,* 237 Cal.App.4th at p. 1054.) Moreover, other cases contain language similar (though not identical) to Hayden's purported quotation. (E.g., *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7 ["a party cannot rely on the allegations of his own pleadings, even if verified, to make or supplement the evidentiary showing required in the summary judgment context."]; see also Code Civ. Proc., § 437c, subd. (p)(2) ["The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists . . . ."].)

B. *Discussion.*

Preliminarily, the asserted error must be deemed harmless because there has been a full trial. (See part III.A, *ante*.) Birle testified at trial; Hayden does not claim that he was barred from doing so. Thus, this is a situation in which "'"[a] decision based on less evidence (i.e., the evidence presented on the summary judgment motion) should not prevail over a decision based on more evidence (i.e., the evidence presented at trial)."' [Citation.]" (*Transport Ins. Co. v. TIG Ins. Co.*, *supra*, 202 Cal.App.4th at p. 1011.)

And yet again, we also reject the asserted error on the merits.

Hayden argues that a declaration is a pleading. He claims that, according to Black's Law Dictionary (8th ed. 2004), "pleading" is defined as "every legal document filed in a lawsuit, petition, motion and/or hearing, including complaint, petition, answer, demurrer, motion, declaration and memorandum of points and authorities . . . ." (Italics omitted.)

Not so. That particular edition of Black's contains no such wording. It defines "pleading" as "[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses." (Black's Law Dictionary (8th ed. 2004) at p. 1191.) While it goes on to define various phrases that include the word "pleading" (such as "sham pleading") (*ibid.*), none of these definitions would include a declaration — much less "every legal document filed in a lawsuit."

The latest edition of Black's contains an identical definition. (Black's Law Dictionary (10th ed. 2014) at p. 1339.) Admittedly, it also quotes an 1873 guide to

common law pleading which states that "pleading" includes "the declaration, which is a statement in writing of [the plaintiff's] cause of action, in legal form," and which the defendant may respond to with a demurrer. (*Ibid*., italics omitted.) Clearly a "declaration," in this context, is not what we would call a declaration but rather an obsolete term for a complaint. (See *id*., at p. 494 [giving as one meaning of "declaration," in "[c]ommon-law pleading," as "[t]he plaintiff's first pleading in a civil action"], italics omitted.)[7]

Thus, the trial court could properly consider Birle's declaration in opposition to the motion for summary judgment.

In a related contention, Hayden argues that the trial court was biased against him "because he was handicapped and was acting in Pro Per . . . ." He asserts that it ruled against him on the ground that it *could* consider the opposition party's declaration, even though supposedly, in another case, it had ruled against him on the ground that it *could not* consider the opposing party's declaration.

Hayden forfeited any claim of bias by failing to bring a disqualification motion below. (Code Civ. Proc., § 170.3, subd. (c)(1); *People v. Guerra* (2006) 37 Cal.4th 1067, 1110-1111, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151 see also *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1339.)

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[7] Even if Hayden were correct, Birle's declaration is not Platinum's "own" pleading. While Birle is the principal of Platinum, he and Platinum are distinct legal entities. However, this is the least of the problems with Hayden's argument.

Hayden additionally forfeited this claim by failing to have the record of whatever other case he is referring to made part of the present appellate record (by requesting judicial notice of it or otherwise) and by failing to cite to the relevant portion of it. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [a brief must support any reference to a matter in the record by a citation].)

VIII

DISPOSITION

The judgment is affirmed. Platinum and Anebur are awarded costs on appeal against Hayden.

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RAMIREZ
P. J.

We concur:

MILLER
J.

SLOUGH
J.